

MODEL APPELLANT'S BRIEF

2003 CHANGES TO ASCTR 4-1 and 4-2

July 2003

IN THE
SUPREME COURT OF ARKANSAS

ST. PAUL FIRE & MARINE
INSURANCE COMPANY

APPELLANT

v.

No. 98-990

GRIFFIN CONSTRUCTION COMPANY

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF SEBASTIAN COUNTY

THE HONORABLE JOHN G. HOLLAND, CIRCUIT JUDGE

ST. PAUL'S ABSTRACT, APPELLANT'S BRIEF, AND ADDENDUM

Curtis L. Nebben (80106)
BASSETT LAW FIRM
P. O. Box 3618
Fayetteville, AR 72702-3618
(501) 521-9996
cnebben@mc2k.com

D. P. Marshall Jr. (90087)
BARRETT & DEACON
P. O. Box 1700
Jonesboro, AR 72403-1700
(870) 931-1700
pmarshall@barrettdeacon.com

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I.

INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL? None

II. BASIS OF SUPREME COURT JURISDICTION? See Section V.

(☐) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) ☐ Construction of Constitution of Arkansas

(2) ☐ Death penalty, life imprisonment

(3) ☐ Extraordinary writs

(4) ☐ Elections and election procedures

(5) ☐ Discipline of attorneys

(6) ☐ Discipline and disability of judges

(7) ☐ Previous appeal in Supreme Court

(8) ☐ Appeal to Supreme Court by law

III. NATURE OF APPEAL?

(1) ☐ Administration or regulatory action

(2) ☐ Rule 37

(3) ☐ Rule on Clerk

(4) ☐ Interlocutory appeal

(5) ☐ Usury

(6) ☐ Products liability

(7) ☐ Oil, gas, or mineral rights

(8) ☐ Torts

(9) ☐ Construction of deed or will

(10) ☒ Contract

(11) ☐ Criminal

A few months after Griffin Construction started renovating the historic Josiah Foster building in Fort Smith, the building burned down. Griffin had insured its financial interest in the renovation project with a builder's risk policy issued by St. Paul.

The building was owned by another entity. After the fire, St. Paul paid Griffin almost three hundred thousand dollars for everything from earplugs to lost profits. But the parties disagreed over coverage for a custom elevator and staircase that were not destroyed by the fire, and Griffin filed this lawsuit seeking about \$60,000.00 for that custom equipment.

Griffin eventually abandoned that claim, however, and asserted a right to \$1.5 million -- its estimate of the completed value of the Josiah Foster renovations. Griffin stood this claim on Arkansas's valued policy law. A.C.A. § 23-88-101. That statute liquidates damages, in cases of a total loss of real property by fire, at the full amount stated in a fire insurance policy. The Circuit Court rejected St. Paul's arguments that an estimated premium and floating coverage made this builder's risk policy open, not valued, and entered the Judgment that Griffin sought. St. Paul appeals.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT? No.

V. EXTRAORDINARY ISSUES?

- ☒ appeal presents issue of first impression,
- ☐ appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
- ☐ appeal involves federal constitutional interpretation,
- ☒ appeal is of substantial public interest,
- ☒ appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
- ☒ appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

II.

JURISDICTIONAL STATEMENT

1. Arkansas's valued policy law liquidates damages at "the full amount stated in the policy . . ." after a total loss of insured real property by fire. A.C.A. §§ 23-88-101. St. Paul issued its builder's risk policy to Griffin Construction for an estimated premium which, in turn, was based on the contractor's estimate of the total value of the planned renovations to the Josiah Foster building. Griffin Construction did not own the building. The policy limited coverage to Griffin's actual loss from a fire or another peril. Griffin had paid its estimated premium, and the contractor's partly completed renovations were totally destroyed in the fire. Does Arkansas's valued policy law embrace the builder's risk insurance that Griffin bought from St. Paul, entitling the contractor to recover the estimated value of the completed project?

2. I express a belief, based on a reasoned and studied professional judgment, that the one question in this appeal is jurisdictionally significant.

The case presents an issue of first impression: no Arkansas appellate court has ever applied our valued policy statute to a builder's risk policy like the one Griffin Construction bought from St. Paul. Several other states have confronted this issue. And contrary to the Judgment in this case, all other jurisdictions agree that this kind of statute does not control this kind of policy. The Arkansas Supreme Court needs to answer this question for our state.

Other Rule 1-2(b) factors also weigh in favor of our Supreme Court taking jurisdiction. This case turns on the construction of A.C.A. § 23-88-101. Our state's valued-policy jurisprudence needs to be clarified with a decision interpreting the reach of that statute. The potential extension of our valued policy law to builder's risk policies is of substantial public interest: this case is important to all the insurers who sell these policies, all the contractors who buy them, and the wider public who ends up paying for this expense of doing business.

For all these reasons, the Supreme Court should hear and decide this case.

By _____
Attorneys for Appellant St. Paul

III.

POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

A. Does The Valued Policy Law Control Griffin Construction's Insurance With St. Paul?

1. Did Griffin Buy A Valued Fire Insurance Policy?

American General Fire & Cas. Co. v. Buford, 716 S.W.2d 86 (Tex. App. 1986, writ ref'd n.r.e.)

Jones v. State Farm Fire & Casualty Co., 740 S.W.2d 708 (Mo. App. 1987)

2. Will Applying The Valued Policy Statute To Open Builder's Risk Policies Defeat The Statute's Purposes?

Tedford v. Security State Fire Ins. Co., 224 Ark. 1047, 278 S.W.2d 89 (1955)

Farmers' Home Mut. Fire Ass'n. v. McAlister, 171 Ark. 574, 285 S.W. 5 (1926)

3. Was The Uncompleted Part Of The Renovation Project Real Property Covered By The Statute?

Farm Bureau Mut. Ins. Co. v. Barnes, 228 Ark. 68, 305 S.W.2d 673 (1957)

Farmers Union Mut. Ins. Co. v. Denniston, 237 Ark. 768, 376 S.W.2d 252 (1964)

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D. Miscellaneous

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V.

ABSTRACT

A. Deposition

1. Excerpt From The Deposition Of Ida C. Hunter

[**Abstractor's Note:** This excerpt, **Record ("R") 185**, was Exhibit A to St. Paul's Response to Griffin's Counter-Motion for Summary Judgment, **R 182**. St. Paul's Response is document 11 in the Addendum.]

Griffin Construction did not own the building at 222 Garrison when it was destroyed by fire. **R 192.** As the chief financial officer of Griffin Construction, I also handle insurance for the Griffin Family Trust and Richard Griffin. Two policies of insurance covered 222 Garrison. One was the St. Paul policy, and the other was through the Maryland Companies. The Maryland policy was our package policy. **R 193.** I turned in a loss for \$500,000.00 to the Maryland Companies when the building on Garrison burned. It was my understanding that the Maryland policy covered the shell of the building. **R 194.**

The Maryland Companies paid \$505,000 pursuant to its policy. **R 194-95.** I don't remember who the check was made payable to. **R 195.** I have the check stub somewhere at my office, and I will provide that to my attorneys so that they can give it to you. **R 196.**

The Maryland Companies covered all of our properties for lots of things. There is an auto policy in there, there is a contents policy; that's our package policy. It insured all our risk. **R 197.**

Before this lawsuit, I never made a claim to St. Paul for the value of the shell of the building. **R 198.** The Maryland Companies paid \$505,000 for the building. We didn't submit anything to them. They paid the value of the building on their policy. We asked them to insure the building for that much. **R 199.** That's what we felt like the building was worth. We submitted them a figure and they accepted it. They had seen the building. **R 200.**

It is my understanding that Griffin Construction only made a claim against St. Paul in its initial complaint for the stairwell, elevator, and accessories. We did not make a claim for the building. **R 201.**

B. Hearing On Cross Motions For Summary Judgment

The Court: I'm going to deny both Motions for Summary Judgment. **R 605.**

C. Hearing On Pre-Trial Motions

1. St. Paul's Motion To Amend Its Responses For Requests For Admission

The Court: St. Paul has moved to amend its responses to requests for admissions.

Mr. DeLay: Griffin objects. Nothing has changed since St. Paul denied this was a builder's risk policy.

The Court: Does this prejudice you any? **R 608.**

Mr. Nebben: The title St. Paul uses for this kind of policy is a contractor's and property owner's protection policy. It is described generically in the insurance industry as a builder's risk policy. **R 609.**

The Court: I don't see what difference St. Paul calls the policy makes to Griffin if they are still claiming it is not a fire policy. **R 610.**

Mr. Rush: St. Paul plans to argue that this is just a builder's risk policy and that therefore it is not a valued stated policy and that connotation might prejudice Griffin. **R 610-11.**

The Court: I'm going to allow the amended responses to come in.

2. Griffin's Motions In Limine

Mr. Nebben: The jury needs to know various positions that Griffin has taken in this case. This did not start out as a valued policy case. It started out as a disputed claim over an elevator and a stairwell. **R 613.**

Mr. DeLay: We amended our complaint when St. Paul denied it was a builder's risk policy. I should not have to testify as a witness and have to explain to the jury why we made the decision to amend. **R 614.**

Mr. Nebben: I think the questioning goes like this with my adjustor: "In your dealings with Ida Hunter of Griffin Construction, did they ever make the claim for the building prior to the lawsuit being filed? No."

The Court: Is that relevant?

Mr. Nebben: Yes, sir, because if there's going to be dispute over what this policy means, St. Paul can say that Griffin knew that the policy did not cover the building, they thought it was just a property owners or builder's risk policy. And we believe that a builder's risk policy does not come under the valued policy law.

Mr. DeLay: My clients had never heard of the valued policy law before they came to our office. And we can amend our theory of the case at any time. **R 616.**

The Court: I'm going to sustain Griffin's motion in limine on previous complaints and previous claims. **R 618.**

Mr. DeLay: Second, we have moved the Court to prevent any evidence about other policies of insurance. The cases say that other insurance does not affect liability on a value-stated policy. So the other insurance is irrelevant, and it would only prejudice the jury. **R 618-19.**

Mr. Nebben: All the previous cases deal with *pro rata* causes. This policy has an other insurance clause. That issue has never been decided by the Arkansas Supreme Court and we're entitled to bring it up. **R 619.**

The Court: Griffin's second motion in limine about the other insurance policy is granted.

Mr. DeLay: Third, we moved in limine to prevent evidence or testimony about the value of the property. **R 620.**

The Court: Well, according to St. Paul's theory of law they are entitled to do that. And according to your theory, they are not. The question is whether it is a

valued policy or not. I think St. Paul is entitled to show what the property is valued so I overrule Griffin's third motion in limine. **R 621-22.**

D. Trial

1. Griffin's Case

- **Direct Examination of Richard B. Griffin**

I'm a building contractor and real estate developer. I am the president of Griffin Construction. We have restored buildings, built schools, churches, shopping centers, and service stations. In the last ten years we've built nursing homes. **R 672.**

The project at 222 Garrison Avenue involved renovating the Josiah Foster building. It was built prior to the turn of the century and was one of the few buildings in Fort Smith on the National Historic Register. It was a four story building with a basement in excellent condition. We were restoring it to an office building. We had just completed the restoration of another old building on Garrison Street. **R 672-73.**

Ida Hunter handles getting insurance for Griffin Construction. **R 673.** She is our chief financial officer and comptroller. She got the insurance from St. Paul. She negotiated all the terms. Ida would have done everything but signing the check. My wife, my son Rick, and I are the shareholders in Griffin Construction.

The Josiah Foster building is owned by the Griffin Family Trust. It wasn't owned by the construction company. **R 674.** My wife and I created the trust a few years ago to make things easier at our deaths. We transferred a lot of property, including the Josiah Foster building, into the trust.

The Josiah Foster building burned to the ground in the middle of the night on 20 December 1996. A few bricks were left standing, and we just knocked them down.

R 675. It was a big fire because of the size of the building and there was a lot of wood inside it. We had to remove all the debris; everything just fell down in the basement.

R 676.

It was Ms. Hunter's responsibility to inform St. Paul that we had a total loss. She kept me posted on developments. St. Paul made a partial payment of \$286,573.67.

R 677.

Griffin put up a premium deposit of \$4,000.00. The policy value for the Josiah Foster building project was \$1.5 million. That's what my company reported to St. Paul. I recognize the document that has been marked as Plaintiff's Exhibit No. 1. That's the reporting form we filled out. It has a valuation or contract price of \$1.5 million for the renovation of the building at 222 Garrison Avenue. It also contains a formula with the rate per thousand. **R 678.** That shows that our quarterly premium for this project was \$938.00. That was for the quarter between September and December 1996. We paid a premium deposit of \$4,000.00 because we expected to have other projects going. **R 678-79.** After this premium payment was deducted, we still had about \$3,000.00 on deposit for premiums. **R 679.**

Plaintiff's Exhibit No. 1 was admitted without objection. **R 680.**

I recognize the document marked as Plaintiff's Exhibit No. 2. That is the insurance policy issued by St. Paul that covered the building at 222 Garrison Avenue.

Plaintiff's Exhibit No. 2 was admitted without objection. **R 681.**

I am asking the jury to award us the value of the policy, what we paid the premium on. That would be \$1.5 million less whatever St. Paul has already paid. The exact figure is \$1,213,426.33. **R 707.**

- **Cross Examination of Richard B. Griffin**

The tornado in the Spring of 1996 damaged this building. **R 707.** It kind of took the lid off and a lot of masonry, and of course the windows. It damaged the masonry structure, the roof structure of the building, and peeled the roof off.

Griffin Construction Company was renovating this building for the Griffin Family Trust. **R 708.** I don't know if there was a written contract or not. We ascertained the value of the renovation project and that is what we bought the policy on. The construction company was to be paid by the trust for the work. It would have been paid its costs plus overhead of at least 10%. **R 709.** I agree that on a construction project, every day you do more work and add more materials and put more overhead into it. You spend more energy every day. That certainly includes payroll costs for Griffin Construction employees. It certainly includes materials. It certainly includes materials that aren't put in the building such as propane, ice for water coolers, and various city and state fees.

The Griffin Family Trust chose not to rebuild the building. **R 710-11.** I was privy to the claim Griffin Construction made with St. Paul but I delegated the details to Ms. Hunter. This \$1.5 million policy was to cover the entire construction project. **R 711.** The policy covers the Josiah Foster building project. **R 711-12.**

We paid a premium for one quarter on this project. The fire happened before the end of that period. We had other projects under this policy. And we pay premiums on those as long as we were working on them. Once we finished those projects, and turned them over to the owner, then Griffin Construction is off and there is no longer a premium paid. During this time period, Griffin was also doing projects for persons other than the Griffin Family Trust. **R 712.** It would have been anywhere from three to five projects, primarily nursing homes. **R 713.**

- **Direct Examination of Ida C. Hunter**

I've worked for Griffin Construction since June of 1978. As chief financial officer, I supervise the accounting department, preparation of financial statements, tax returns, and purchase insurance. I purchased the insurance involved in this case from St. Paul. **R 714.**

Here is how we came to buy that policy. Mr. Griffin had arranged for financing with First National Bank. We were going to restore the Josiah Foster building. I asked our insurance agent, Bill Plegge, to issue a policy to cover the improvements. He is an insurance salesman for Cashion Company. Ever since I've been at Griffin Construction, he has been our insurance man. After I called him, Mr. Plegge sent me a binder saying we had insurance. About a month later, we got a policy. About two months after that, the building burned. **R 715.**

I recognize the document you have marked as Exhibit No. 3: that is the binder I got from Mr. Plegge on the 222 Garrison project. **R 716.** Plaintiff's Exhibit No. 3 was

admitted without objection. **R 717.** I believed we paid a deposit of \$4,000.00 in October. The premium for the first quarter was \$937.50. **R 720.**

The Court: It is stipulated the premium has been paid. **R 721.**

Plaintiff's Exhibit No. 1 is the quarterly reporting form I helped turn in to St. Paul. The buildings that are being insured under the policy are listed as well as their value times the rate. That equals what we're billed for. That is deducted from the premium deposit until it is used up. Then we start paying extra. **R 722.**

The value Griffin Construction reported to St. Paul on the project was \$1.5 million. I have been to 222 Garrison Avenue since the fire. All that is left is a big hole. **R 723.**

- **Cross Examination of Ida C. Hunter**

It's true that if you need to know something about Griffin Construction Company you should ask me. **R 723-24.** There was no written contract between Griffin Construction and the Griffin Family Trust for this work. I know how the \$1.5 million figure was arrived at: Griffin Construction did an estimate based on materials plus overhead. Sometimes we hit those estimates on the nose, sometimes we don't. Sometimes we go under, and a lot of times we go over. That is the construction industry. Griffin Construction's actual agreement with the Trust was for whatever the project cost plus 10% overhead. **R 724.**

I recognize that document as a spread sheet as prepared by Ken Custer of St. Paul which recaps the bills and information I supplied to him when Griffin

Construction made this claim. The payroll amount, \$104,000.00, is what Griffin spent on its employees. **R 725.** That materials amount, \$112,030.00, is what Griffin spent on materials. **R 725-26.** The materials include things that actually went into the project and other materials that were used on the job such as propane. We use a lot of propane in area heaters. Materials would include our engineering costs for the project. We paid the city for a water or building permit. Burroughs and Associates is an engineering fee. **R 726.** Electricity is in there too, as well as expendable tools such as pliers, screwdrivers, and saw blades used up during the project. Those aren't in the building, but they're used. **R 726-27.**

Mr. Nebben: On behalf of Griffin Construction, while you were working with Mr.

Custer of St. Paul, you never made a claim for the value of the contract, did you?

Mr. DeLay: Objection, your Honor. I think that is why we are here today.

The Court: Sustained.

I headed up Griffin Construction's claim process. **R 727.**

There were at least three construction projects on St. Paul's policy during the time it was in force. Griffin would estimate the value and would send that figure in. And we would send in a premium estimate. St. Paul gave us the rate, and we knew how to calculate the premiums. **R 728.** I don't know how the rate that St. Paul gave us was made up. **R 728-29.** I don't know how that rate compares with the rate on a fire policy. When we finished the other projects covered by the policy, we took them off of

the policy. We did that when the projects were turned over to the building owner. **R 729.**

- **Direct Examination of David Loveless**

I am the underwriter for St. Paul who handled the Griffin Construction policy. **R 731.** That policy did not cover the building located at 222 Garrison. St. Paul covered a project at that location. Griffin paid a deposit premium for starting the jobs that they would do that year which they would then report to us. When Griffin undertook a project, they reported a value to us. **R 731-32.** St. Paul then charged a premium based on the dollar value of the project reported to us by the contractor. **R 732-33.** Griffin reported a value of \$1.5 million for the project on Garrison Street. The quarterly premium on that project was \$938.00. That premium did not buy Griffin up to \$1.5 million in coverage. It depends on how much they had going at the time of the loss. If Griffin had put \$1.5 million into the project at the time of the loss, then the policy would have covered \$1.5 million. **R 733.** I did testify during my deposition that each project that was reported had coverage up to \$1.5 million if at the time of the loss they had that much in the project. **R 734.** As far as St. Paul is concerned, the building at 222 Garrison was a total loss. **R 735.**

This was not a policy of insurance on real property unless you define real property as buildings. **R 737.** The policy could have picked that up if it was part of the project. This was an insurance policy on a renovation project on a building located at 222 Garrison. **R 738.**

- **Cross Examination of David Loveless**

I've been an insurance underwriter for twenty-two years. I have worked for St. Paul for approximately two years. I am familiar with the term "fire insurance policy."

R 738. It is possible now days to buy a fire insurance policy. But nobody really wants to. It is not a very good product. People buy packages of different coverage forms. A typical commercial package would have property insurance and liability insurance. A package brings several coverage forms into one package. The consumer pays one premium and it's simpler. Fire insurance comes under Section 1 of most general commercial packages. It is property insurance.

In the insurance industry, a peril is something that causes a loss. **R 739.** Examples of perils are theft, fire, and lightening. Coverage is the contractual agreement to cover particular perils. There are many different kinds of insurance, for example life insurance, disability insurance, and property insurance. Fire could be a peril for purposes of all of those things. **R 740.** Fire can also be a peril for inland marine insurance. **R 740-41.**

Inland marine coverages are for things that are not stable or static. They move and grow. You can't put a finger on what the value is going to be today or tomorrow.

A fire insurance policy is a named-peril policy that covers a specific building and specific contents in a building. The cornerstone is that it always starts out with a fire peril. Then you can add an extended coverage for lightening or falling objects. **R 741.** I am familiar with the New York Standard fire insurance policy. It was the initial model that fire insurance policies were modeled on across the nation. **R 741-42.** It is still the

basic model for fire insurance, but it has evolved to where companies can broaden it. Most companies have what they call a "all other perils endorsement" or a "extended perils endorsement" that expands coverage into a broader contract. That is the package concept again, and a fire policy is often in with the other liability coverages or automobile coverages.

Homeowner's insurance, for example, is a package of coverages. It covers fire perils, physical damage perils, along with liability exposure. So you are covered if one trips over your sprinkler while walking across your front yard. **R 742.** And you're also covered if you borrow your neighbor's lawnmower. **R 742-43.**

The policy Griffin bought from St. Paul is a inland marine policy. A builder's risk under the inland marine policy is an "all other perils" contract. It is an all-risk contract. It does not specify what perils are covered. It just says what is excluded. As long as the perils or the loss that occurred are not an excluded peril, there is coverage. This kind of policy is not regulated or required to be submitted to the Department of Insurance through various states. And the rates are negotiable between the company and their agents and the insured.

A fire policy is not an all-inclusive policy. It's just the opposite, in that only the perils listed in the policy are covered. St. Paul's policy is not a fire policy. **R 743.**

Some insurance policies are open and others are closed. An open policy means that when the insurer enters into the contract, it has no idea what perils or risks are going to come for that insured during that year. The insurer has accepted that uncertainty as long as the insured works on jobs at or under the project limit. The

company accepts coverage without any further underwriting. That would be an open policy. A closed policy is where the insurer knows it is covering one location. It underwrites that location and there will be no additions or subtractions from it. **R 744.** The original New York Fire Insurance Policy for example was a closed policy. **R 744-45.** The St. Paul policy in this case is an open policy.

St. Paul's policy is a combined builder's risk, renovation, and installation risk policy. Those are generally three separate types of inland marine policies. We brought them together so there would be no confusion as to which contract we should offer or what would be best. St. Paul's policy is generic and will fit all those situations. We have those three types of coverages. Builder's risk is covered. Inland marine is not the form, it's the division of insurance. **R 745.** Builder's risk written on inland marine is an open, unregulated policy.

222 Garrison Avenue is not mentioned on the policy St. Paul issued to Griffin. **R 746.** St. Paul knew about the project there only because Griffin reported to us each quarter what jobs they had in progress. **R 746-47.** That is part of the open feature of this policy. Griffin could submit a \$5 million project on the policy, but we would have to revise the policy before we would cover it because that is over the project limit. St. Paul would accept anything under \$3 million with no question. Under the heading "Description Of Location Of Risk", the policy says "Various-Open Builder's Risk." Various describes the location. The location is wherever they report work to us for that quarter. The policy is not specific to any one location. **R 747.** The policy has different annual rates for frame construction jobs versus renovations. The project limit is the

amount St. Paul would accept without question or without any underwriting. The policy also calls for "completed value reporting" and that box is checked. It means that Griffin will make quarterly reports of the completed value of any project. Griffin will tell us the amount of the project and on that we will calculate our quarterly rate. **R 748.** The number of projects fluctuate.

St. Paul divides the rate it charges for builder's risk coverage in half. We do that because at the beginning of the builder's risk, the contractor will have nothing but a vacant lot. There will be no risk there whatsoever. At the end of the project, you will have a finished project or a finished building. It would be unfair to charge the contractor the rate we would charge on a completed building from the beginning because it isn't there. The contractor is beginning now with a vacant lot. So we anticipate charging a rate at the mid-point or average of the construction job. At the beginning, therefore, when you just have the basic foundation, the contractor might be paying a little more, but after the project goes past the mid-point, he is actually paying less for the exposure he has in front of him. That is our way of balancing out the exposure. **R 749.**

This policy covers other property too. It covers the contractor's office trailer on the site. It covers overhead and labor. The policy will cover the building contract for as long as the contractor is reporting to us. **R 750.** Page 3 of the policy specifies when coverage ends. It says "will cover from the time the property is at your risk and continue until testing is completed. Coverage ends when the contract purchaser takes

control of the property, when your interest in the property ends, or this policy expires or is canceled whichever happens first."

When St. Paul receives notice from a contractor that there is going to be a new project, it cannot go out and inspect the project. There is nothing there. We could go out three weeks or so later and inspect. But we won't see much. There'll be very little more there. I've been an underwriter for twenty-two years. In my opinion, a construction project must be about 70% complete before an insurer can make a legitimate inspection and put a value on the property. **R 751.**

Griffin Construction paid an estimated premium. It is not an actual premium. It is estimated because there is no guarantee at the beginning of the project that, when everything is said and done, the project will end up at the value reported. The project limit on this policy was \$3 million. On the 222 Garrison job, Griffin Construction reported a project limit to us of \$1.5 million. That was their estimated limit. **R 752.**

The policy specifies the amount St. Paul will pay if there is a claim. The policy says "the project limit is based on your estimate. We estimate your premium based on what you tell us the completed value of your project will be. The estimated amount becomes the project limit." Here the estimate was the \$1.5 million that Griffin Construction reported to us. **R 752-53.** Now back to the policy. It states "however, the amount we will pay is not the project limit. The amount we will pay is determined by the actual costs of the labor and materials you have expended, plus your profits as determined at the time of the loss. So the actual limit of coverage on any date will be a percentage of the estimated value." The risk changes every day.

This policy allows the adjustment of premiums. St. Paul is allowed to audit each project at the end of the year. **R 753.** We come to a final premium in the situation like this at the end of the year. We look over all the amounts reported to us. It's like balancing the checkbook. St. Paul goes back and calculates the premiums against the rate. If we find that the contractor didn't do enough jobs to get to the deposit premium, St. Paul refunds the amount of money left under the deposit premium. If it's more than that, St. Paul charges an additional premium.

The insured can always add to their coverage when they are close to the project limit. For example, if Griffin had been close to the \$1.5 million and the job was 80% complete, we could have increased the limits to \$2 million. But then St. Paul would have gone back to the very first period that Griffin Construction reported the job and adjusted those periods for \$2 million of coverage. I don't know why a contractor would have an incentive to increase their premium. I guess if the project value had exceeded the coverage limit, they would have an incentive to increase their coverage. **R 754.**

It is also possible that the premium will be reduced at the end of the project. I've had one instance of that. The contractor was building a Wal-Mart store. Initially they reported to us that they got both the building job and the site and driveway and parking lot job. It turned out that the contractor did not get the building job, so I reduced the project limit to cover the part of the project they got. St. Paul went back to the inception and returned some of their premium. **R 755.**

- **Bench Conference On Other Insurance**

Mr. Nebben: Your Honor, because Griffin asked Mr. Loveless about whether this policy covered the building, I think that raises the other insurance. I don't want to ask whether there was another insurance policy in this case. But I do want to ask the witness about the clause in this policy about other insurance. Because if the building is covered by other insurance, then St. Paul gets to back out that amount.

The Court: Overruled. **R 755-56.**

- **Re-direct Examination of David Loveless**

A fire loss was one of the perils covered under this policy. **R 756.** I don't believe I testified that nobody sells fire insurance policies any more. I said they are very seldom used. I understand that this case is about the valued policy law in Arkansas. A valued policy means that, in the event of a complete loss, the insurer will pay policy limits. **R 757.** If someone purchases a homeowner's policy from St. Paul, it is not called fire insurance policy. **R 757-58.** I don't know whether a homeowner's policy would fall within the valued policy law of Arkansas. I don't know if that issue has ever come up at St. Paul. I work strictly in the commercial and inland marine department. I don't work in personal lines. I don't know if St. Paul sells a product called fire insurance. I have worked in the inland marine underwriting department for two years. I believe St. Paul sells homeowner's insurance in Arkansas, but I'm not sure. We do not write it in Texas. **R 758.** This policy would cover Griffin Construction's financial interest in the building if the building was part of the project.

- **Re-cross Examination of David Loveless**

It would be very rare these days to sell a stand-alone fire insurance policy.

R 759. Fire insurance is sold as part of packages. In my twenty-two years of experience, I have never seen a policy that covers nothing but fire. They always have other coverages to go with it. **R 760.**

2. Motion Hearing

Mr. DeLay: Your Honor, at this time plaintiff rests. **R 762.** We renew our Motion for Summary Judgment on the basis that this is a value stated policy as a matter of law. We have shown that this is a fire insurance policy, that there was a total loss, that the amount on which premiums was collected was \$1.5 million, and therefore that is what we are entitled to.

The Court: Overruled. **R 762-63.**

Mr. DeLay: That is our motion and we have a directed verdict motion as well.

Mr. Nebben: Your Honor, St. Paul moves its Motion for Summary Judgment and moves for a directed verdict at the close of the plaintiff's case in chief. First, this is not a fire policy. It is an inland marine insurance policy and it is an open policy, not closed. Therefore, the policy is not subject to the valued policy law. Second, Griffin Construction did not lose real property as identified by the statute. Third, the testimony of David Loveless is that this policy involves a weighted premium. The premium is not collected on the entire amount. **R 763.** This is not a valued-policy situation because

St. Paul is unable to value the project at the beginning. That is the intent behind the 1889 law. St. Paul believes that this is not a valued policy and therefore it should be entitled to judgment.

The Court: Overruled. **R 763-64.**

3. St. Paul's Case

- **Direct Examination of Bill Plegge**

I'm an insurance agent with the Cashion Company. I've been an agent for various companies for more than thirty years. I've always handled contractors and construction people. **R 765.** Griffin Construction has been one of my clients on and off for nearly thirty years. **R 765-66.**

I was the agent for the St. Paul policy that Griffin bought. They came to me when they desired coverage on projects they were going to build. This policy is what is called a blanket monthly or quarterly reporting builder's risk policy. It is not a single policy for a single project. **R 766.** The difference between the two is that this policy is designed to pick up work that they get along the way. It's just added on. Whenever they start a project, it's automatically covered by this policy and then reported quarterly to Cashion Company and St. Paul. Otherwise Griffin would have to buy separate policies for each construction job.

This kind of instrument has been around in the industry for a long time. I have dealt with it for many years. This kind of policy has advantages for Griffin. When they pick up a new project, all they have to do is notify us and it's automatically covered.

The premiums for this kind of policy are very competitive compared to individual policies. Another advantage is the way we do the deposit premium. Once that is paid, we draw against it and thereafter the insured makes quarterly payments. That enhances a contractor's working capital position where they don't have to put out a lot of money up front on each and every project that they start. **R 767.** I'm not familiar with the term "open policy." **R 767-68.**

I know Richard Griffin and Ida Hunter. I have dealt with them in the past. Ms. Hunter is a very astute business woman. I have dealt with her for as long as she has been at Griffin, more than fifteen years.

The premium on a builder's risk policy is weighted. It is different from an automobile policy or fire policy or package policy. It is weighted because the insurance company recognizes that in the early stages of construction there is very little risk. As the project nears completion, the full policy amount becomes at risk. So the premium is weighted with that knowledge, knowing that early on there is not as much risk as there is at the end. **R 768.**

When you have a construction project on a builder's risk, the agent can go out and look at the project on day one but there's nothing there. So the value is zero. It would change daily from then on, depending on how much work and materials that the contractor put into it. I've never seen a construction project that would be leveled, or move up in a perfect scale.

I'm familiar with the term "package" in the insurance industry. A package policy is like a homeowner's in that it covers a multitude of risks. **R 769.** In a homeowner's

package you would find a fire policy in the property coverage. The St. Paul policy in front of me is a builder's risk policy. It includes fire coverage, it includes the peril of fire. There is a distinction between perils and coverages. Coverages remind me of liability, property, equipment, that type of thing. **R 770.**

- **Cross Examination of Bill Plegge**

St. Paul's policy covered fire loss. **R 770.** The building at 222 Garrison was in existence when the policy was entered into. I don't know whether homeowner's insurance comes within Arkansas's valued policy law. My understanding of the valued policy law is that if an insurance company writes a fire-type policy on a piece of property, and accepts the premium for that coverage, and there is a total loss, the insurance company pays the policy amount. I'm not an expert in that line of policies. **R 771.** I would assume that a homeowner could come within this particular law if their home was destroyed. I have been selling insurance for more than thirty years, and I have never seen a straight fire insurance policy. **R 772.**

- **Re-direct Examination of Bill Plegge**

I deal with other companies beside St. Paul. **R 772.** I handle insurance with a construction-type business. So there are other lines, such as homeowner's, that I don't get involved in. I don't know much more about those than my own policy. **R 772-73.**

- **Direct Examination of Kenneth Custer**

I'm a claim representative for St. Paul. I've been a claim representative for eleven years. I handle every line of insurance except worker's compensation. I investigated Griffin Construction's claim, evaluated the damages and coverages, and resolved the claim. I dealt with Ida Hunter at Griffin. **R 774.** As part of my handling of this claim, I met with Mr. Griffin and Ms. Hunter at their office in Fort Smith and asked for all of their documents about the project. I followed up with a letter, and they gave me everything. **R 775.** I understood that their documentation was Griffin Construction's loss at that time. **R 775-76.** This is a spread sheet I prepared compiling all the invoices and other documents that Ms. Hunter gave me. I gave a copy of this document to them.

Griffin supplied me invoices and documentation covering \$268,602.21 of items. We denied some items, approximately \$70,000.00 to \$80,000.00 worth. **R 776.** St. Paul then paid Griffin Construction \$286,573.67. That included materials that went directly into the job, Griffin's overhead for the job, and labor for the job. We paid for gas for the supervisor's vehicle. We paid for fuel for generators, and various fees. **R 776-77.** We paid architects' fees, state fees, city fees, and engineering fees. We also paid for expendable tools like drill bits and saw blades that are used up on the job. We probably paid for materials that were on the job site damaged but weren't actually in the building. If Griffin gave us an invoice for a box of nails, we paid for it. We even paid for ice to cool the workers down. That is part of overhead. **R 778.** We paid for propane, and debris removal. We paid for lots of things: scaffolding, ear plugs, a telephone, porta lite hookups, oil, light stands. I don't believe I ever got any receipts

beyond the \$267,0000.00 worth from Ms. Hunter. **R 779.** The only things we didn't pay for were rejected because coverage was excluded under the policy. **R 779-80.** St. Paul's payment included a 10% overhead factor on the amount of the invoices and materials we got. We paid 10% as overhead on everything else that we paid. **R 780.**

I handled personal insurance lines when I worked in Tulsa. **R 780-81.** I saw the original fire insurance policy as a trainee. Now what we have are derivatives of that original fire policy. They are on specific buildings, specific sites, and they are insured for a specific value. This policy covers many sites. When Griffin bought it, they did not have all of those sites. St. Paul did not have specific value. St. Paul can't have specific values on a policy like this because it changes every day. As the contractor is working, it changes continually as the labor charges go into the amount of what the contractor has for the building. **R 780.** Griffin never made a claim for the building through St. Paul. **R 781-82.**

- **Cross Examination of Kenneth Custer**

Part of homeowner's insurance is certainly fire loss protection. If somebody wanted to purchase a St. Paul homeowner's insurance policy they wouldn't ask for a St. Paul fire policy. If there is a total loss by fire of a home insured by a homeowner's policy, the insured gets the amount stated in the policy on which premiums are paid. This fire was a total loss. **R 782.** The policy that is the subject of this lawsuit protects against the perils of fire, but it is not a fire policy. **R 783.**

- **Re-direct Examination of Kenneth Custer**

This is not a fire policy, but it protects against perils including fire. Inland marine and builder's risk coverages are derivatives of ocean marine insurance. They are considered marine insurance because these kind of coverages originally started in the transient nature of the marine business. Inland marine is considered transient because the values are changing continually. It is like cargo running up and down the highway. On a fire policy, as in a homeowner's policy, that comes from the original fire policy. **R 783.** It's a derivative of that policy which is on a stated place, building or contents, with a stated value. The value that St. Paul insures doesn't change, subject of course to cost of living adjustments that are made on the policy itself. **R 783-84.** If a commercial entity like Griffin Construction wanted a package of coverages to protect buildings from fire, St. Paul has a product for them. It is called the St. Paul property protection. That would insure the building itself. There are several other parts of it, but basically what we have is property protection for the building itself. This inland marine police is not for a building. This is for a project.

4. Motion Hearing

Mr. Nebben: The defense rests. **R 784.**

Mr. DeLay: At this time Griffin renews its Motion for Summary Judgment and directed verdict for the reasons previously stated.

The Court: Overruled.

Mr. Nebben: St. Paul renews its Motion for Summary Judgment and directed verdict.

This statute deals with a fire insurance policy. It is not a situation where a fire risk is involved. **R 785.** The first question for the Court is: is there a fire policy. Considering the case of Bennett v. Allstate, the Court must look at whether there is an open or closed policy in this situation. This policy is conclusively an open policy. There is no evidence to the contrary. **R 785-86.** Second, the Court should look at the character of the policy. The valued policy statute is limited to real property considering the real character of the property. The character of the policy is related to the need for inspection of the property. It deals with whether the insurer can inspect the property before accepting the risk. It cannot do so in a builder's risk policy.

The Court: I thought you stated in opening statement that you could inspect.

Mr. Nebben: St. Paul could go out there, but there's nothing to inspect. As the witness has said, on day one there is zero there. **R 786.** The Court should also consider what the premium is calculated on. This is a weighted premium. It is not calculated on fire insurance principles. It is calculated on the fact that every day there is going to be a different risk. There is no way that St. Paul's policy covers this risk. This is not a closed-value situation. It is an open-value situation.

The Court: Overruled. **R 787.**

5. Jury Instructions

NO. 6

In determining the type of policy that was issued by the defendant, St. Paul Fire & Marine Insurance Company, you are entitled to consider the manner in which the premium was computed and its amount as circumstances to be considered in determining the character of the risk which the plaintiff, Griffin Construction Company, intended the defendant to assume. **R 795.**

NO. 7

In order for Griffin Construction to recover proceeds from St. Paul, it must have an insurable interest in the building located at 222 Garrison Avenue. Griffin had an insurable interest in the property if it would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction. If it would sustain such loss, it is immaterial whether it has, or has not, any title in, or possession of the property itself. **R 796.**

NO. 8

There was in force in the State of Arkansas at the time the contract of insurance was entered into between Griffin Construction Company and St. Paul Fire & Marine Insurance Company, a statute, which provided:

- (a) A fire insurance policy, in case of a total loss by fire of the property

insured, shall be held and considered to be a liquidated demand and against the company taking the risk, for the full amount stated in the policy, or the full amount upon which the company charges, collects, or received a premium.

Griffin Construction Company claims damages from St. Paul Fire & Marine Insurance Company pursuant to this statute and has the burden of proving each of three essential elements:

First, that there was a fire insurance policy in force on December 20, 1996, which insured its real property located at 222 Garrison Avenue in Fort Smith, Arkansas.

Second, that there was a total loss by fire to the insured building, and

Third, that St. Paul failed to pay Griffin Construction Company the full amount stated in the policy, or the amount the company received and collected a premium on.

If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for Griffin Construction Company. **R 797.**

NO. 9

The valued policy statute is a part of every policy of insurance on real property in this State, the same as if it were actually written in the policy.

Real property means land and all things contained thereon, including buildings, structures, fixtures, and improvements. **R 798.**

NO. 10

Marine insurance is defined to include insurance against any and all kinds of loss

or damage to personal property in connection with or appertaining to a marine, inland marine, transit, or transportation insurance, including liability for, loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance, or use of the subject matter of the insurance. **R 799.**

NO. 11

In interpreting a policy of insurance, you are instructed to use a common sense approach fairly and reasonably to ascertain and carry out the intent of the parties and generally, the words employed in the policy are to be construed in their ordinary sense. **R 800.**

NO. 12

If you find that a term or clause of the St. Paul policy is ambiguous it must be construed in favor of Griffin Construction Company. To be ambiguous a term or phrase must be susceptible to more than one reasonable interpretation. **R 801.**

NO. 13

Under Arkansas law, insurance coverages may come within the definitions of two (2) or more kinds of insurance. Inclusion of coverage within one (1) definition of insurance shall not exclude it as to any other kind of insurance within the definition of which that coverage is reasonably includable. **R 802.**

NO. 14

A fire policy is a form of property insurance wherein an insurance company agrees to indemnify another party in whole or in part up to a specified amount for loss or damage to designated property, either real or personal, by fire.

A fire policy is a "valued" or "closed" policy which means the parties have agreed upon the value of the property at the time of entering into the insurance contract in the event of future loss. **R 803.**

NO. 15

"Property insurance" is insurance on real or personal property of every kind and of every kind and of every interest therein, whether on land, water, or in the air, against loss or damage from any and all hazard or cause and against loss consequential upon the loss or damage, other than noncontractual legal liability for the loss or damage.

R 804.

NO. 16

When I use the phrase liquidated demand I mean a demand the amount of which has been ascertained or settled by agreement of the parties. **R 805.**

NO. 17

If you decide for Griffin Construction Company on the question of liability, you

must then fix the amount of money which will reasonably and fairly compensate it for the damage it sustained.

If the St. Paul policy attempts to limit its liability for a total loss in any respect, such a clause is void as a matter of law. St. Paul must pay the total amount stated in the policy, or the full amount premiums were received and collected on, less what has already been paid to Griffin Construction Company. **R 806.**

The Court: I'm going to give you these instructions to take with you and two verdict forms. One says "We the jury find in favor of the plaintiff, Griffin Construction Company, and award it damages in the amount of _____ dollars." The other form says "We the jury find in favor of the defendant, St. Paul Fire & Marine Insurance Company." You will just use one of those. I'll give you the exhibits, and if you will follow the bailiff, please, begin your deliberations now. **R 826.**

[Abstractor's Note: The jury retired to deliberate at 3:45 p.m.]

The Court: We discussed instructions and objections were made before I instructed the jury. For the sake of time, the Court allowed the parties to make their objections on the record after the jury retired to deliberate. **R 827.**

Mr. Nebben: St. Paul objects to the Court's failure to give proffered Instruction No. 1.

R 833. The instruction is based on Farm Bureau Mutual Insurance Company v. Barnes. It explains that the valued property statute only

covers real property, which is property of a permanent nature readily opened to inspection and susceptible to reasonable accurate valuation. That promotes the statutory purpose of not over valuing property. In this situation, the property could not be inspected because it is a building project which grows every day. **R 833-34.**

St. Paul also objects to the Court's refusal to give proffered Instruction No. 2. It is an accurate rendition of Arkansas law about the construction of policies that should have been given. **R 834.**

St. Paul's Proffered Instruction No. 1

The valued policy statute that you discussed in the preceding instruction is a part of every policy of fire insurance on real property in this state. The same as if it were actually written in the policy.

For purposes of this statute real property is:

1. of a permanent nature;
2. if readily open to inspection; and
3. is susceptible of reasonably accurate valuation by the insurer.

Authority: Farm Bureau Mutual Insurance Company v. Barnes, 305 S.W.2d 673 (Ark. 1957). **R 835.**

St. Paul's Proffered Instruction No. 2

The plaintiff, Griffin Construction Company, has the burden of proving by a

preponderance of the evidence that the policy of insurance provides coverage for those items claimed by the plaintiff, Griffin Construction Company. When interpreting a specific clause in an insurance policy, consideration is to be to the entire policy as a whole, with an effort being made to harmonize all provisions in a policy.

Authority: J. B. Kramer Grocery Company, Inc. v. Glen Falls Insurance Company, 356 F. Supp. 771 (E.D. Ark. 1973); Silverball Amusement, Inc. v. Utah Home Fire Insurance Company, 842 F. Supp. 1151 (W.D. Ark. 1994); and Continental Casualty Company v. Didier, 301 Ark. 159, 783 S.W.2d 29 (1990). **R 836.**

Mr. Nebben: St. Paul objects to Instruction No. 9 given by the Court which defines real property. Our proffered Instruction No. 1 is a more accurate definition of real property for purposes of the Arkansas valued policy statute.

The Court: Denied.

Mr. Nebben: St. Paul also objects to Instruction No. 12 about an ambiguity in the policy. The Court has to decide first if there is an ambiguity. It has not done so, so the instruction is error.

The Court: Overruled. **R 837.**

Mr. Nebben: St. Paul objects to Instruction No. 13 about insurance coverages coming within the definition of two or more kinds of insurance. That instruction is an accurate rendition of A.C.A. § 23-62-101. But the testimony at trial by Mr. Loveless and Mr. Plegge was that there is no crossover between the fire type policy and the builder's risk inland marine policy we have in this case.

The Court: Overruled. **R 837-38.**

[Abstractor's Note: The jury returned to the Courtroom at 4:38 p.m.]

The Court: Do you have a verdict? **R 838.**

Foreperson Walker: Yes. We the jury find in favor of the plaintiff, Griffin Construction Company, and award damages in the amount of \$1,213,426.33. **R 838-39.**

The Court: Court is adjourned. **R 839.**

VI.

THE STATEMENT OF THE CASE

A fire during the early stage of a construction project, and a particular kind of insurance, call into question the reach of Arkansas's valued insurance policy statute.

The Griffin Family Trust owned the Josiah Foster building, an historic structure at 222 Garrison Street in downtown Fort Smith. **Abstract ("Ab") 5; Addendum ("Add") 64-66.** The four-story shell remained of this nineteenth-century building when the Trust decided to renovate it and create an office building. **Ab 5.** The Trust hired Griffin Construction Company, Inc., to do the renovations. **Ab 7, 9.** Richard B. Griffin was one of the settlors of the Trust, and he is also the president of the construction company. **Ab 5; Add 64-68.**

Griffin Construction called its insurance agent of many years and bought a St. Paul policy to cover this renovation project. **Ab 8, 19.** St. Paul labels this contract a "Contractor's and Owner's Property Protection" policy combining builder's risk, renovation, and installation risk coverages. **Ab 13-14, Add 8-9.** This kind of policy is known generically in the industry as a builder's risk policy. **Ab 14, 19-20; Add 69.** This policy covered Griffin Construction's "financial interest in insured building and installation projects and structures . . ." **Add 19.**

The policy was a creature of estimates. When St. Paul issued the policy, Griffin Construction agreed to tell the insurer "what you know to be the full estimated value of the project so that [St. Paul] can estimate your premium. We estimate your premium

because the final completed value of a project may differ from the original estimate of the project costs." **Add 25.** The parties agreed that the actual premium would be determined when the project was done. "When coverage under this agreement ends, [St. Paul will] figure the premium we've actually earned based on the length of time this agreement was in effect and the actual completed value of the project. If this final premium is more than you've paid, you'll owe us the difference. If it's less, we'll return the difference." **Add 25.** The policy limited coverage to Griffin Construction's actual loss in the event of a covered peril. "The amount [St. Paul will] pay is determined by the actual cost of the labor and materials [Griffin] expended, plus your profits, as determined at the time of the loss. So the actual limit of coverage on any date will be a percentage of the estimated cost." **Add 24.** Fire was one of the perils covered by St. Paul's builder's risk policy. **Ab 21.**

Griffin estimated the value of its renovation project at the Josiah Foster building at \$1.5 million, and provided that estimate to St. Paul. St. Paul did not inspect the renovation project it was insuring -- it could not, because nothing was there except the shell of the old building. Based on the contractor's estimated value of the completed project, St. Paul estimated the premium for the policy at \$4,000.00. **Ab 6, 11, 15-16; Add 25.** Griffin paid a "premium deposit" in that amount. **Ab 6, 8.** The parties agreed that St. Paul would draw an estimated premium of \$938 each quarter from this deposit until the project was finished or the deposit was used up. **Ab 6, 8.**

This builder's risk policy was designed to cover multiple projects. **Ab 7-8, 20.** The total estimated value of all reported projects could not exceed the policy's \$3

million overall limit. **Ab 15-16.** Griffin reported at least three projects to St. Paul for coverage under this policy. **Ab 7, 10; Add 118.** One of them was the Josiah Foster renovation effort. **Ab 6; Add 118.**

Griffin started but never finished the renovation. Early in the project, a fire destroyed the Josiah Foster building and all of the renovations completed so far. Griffin was about four months into its work; it had completed about one-fifth of the renovations. **Ab 1-2, 118.**

After the fire, Griffin Construction made a claim to St. Paul. The contractor did not ask St. Paul to pay it the \$1.5 million estimated value of the completed project. Griffin sought only what it had lost in the fire. **Ab 1-2, 9, 23.** St. Paul paid the contractor \$286,573.67 on that claim: among other things, St. Paul paid for (1) all of the materials that Griffin had used so far in the renovations and that burned up; (2) tools such as drill bits and saw blades that were used up in the construction; (3) propane used in heaters for the workers; (4) ice for the workers; and (5) various local and state fees related to the renovation. St. Paul also paid Griffin a 10% overhead figure for the profits it lost on the part of the project that had been completed. **Ab 9-10, 23-24; Add 77-79.**

St. Paul declined to pay for a custom elevator and staircase and related accessories. **Add 2.** Griffin bought these items for the building, but had not installed them when the building burned. St. Paul believed those items were not covered by this policy because they were not in the building and were not damaged. Griffin, however, believed these custom fixtures were damaged under the terms of the policy because it

could not reuse or resell them. That disagreement was the seed of this lawsuit. **Add 1-2.**

Griffin Construction had other insurance on the Josiah Foster building. It was listed, along with many other properties, on a policy issued by the Maryland Companies. **Ab 1-2; Add 96-111.** Among other coverages, the Maryland policy provided commercial property coverage for this old building to the contractor. **Add 96, 99, 105-06.** The contractor valued the Josiah Foster building at \$500,000.00. **Ab 1-2.** The Maryland Companies had inspected the structure, and accepted that valuation. The policy provided "actual value" and "replacement cost" coverages for this building. **Add 105-11.** After the fire, Griffin sought coverage for the building under this other policy, and the Maryland Companies paid the contractor \$505,000.00 for its loss: \$500,000.00 for the building and \$5,000.00 for debris removal. **Ab 1-2; Add 94-95.**

Griffin eventually sued St. Paul over the elevator and staircase. It sought approximately \$60,000.00 in damages for the cost of those custom fixtures, plus an attorney's fee and the statutory penalty. **Add 1-2.** In due course, St. Paul moved for summary judgment. **Add 38-41.** Three weeks before trial, however, Griffin amended its Complaint and alleged alternative theories: it was either entitled to \$3,000,000.00 (the overall policy limit for all projects) under the valued policy statute, or to the value of the elevator and stairwell. **Add 49-51.** On the same day, Griffin Construction moved for summary judgment too. **Add 44-45.** The Circuit Court eventually continued the trial in response to Griffin's new theory under the valued policy statute. **Add 54.** Then the parties did more discovery and completed their briefs on the summary judgment

motions.

After a hearing, Judge Holland denied both motions. He gave no reasons. **Add 114.** On the eve of trial, Griffin amended its Complaint again. It abandoned its original claim for the custom elevator and stairwell, and revised its claim under the valued policy statute. Griffin's final version of that claim sought \$1,213,426.33 -- the \$1.5 million estimated total value of the Josiah Foster building renovation project, less the \$286,573.67 that St. Paul had paid on its original claim. **Add 77-79.**

The case proceeded to trial. Among other things, on Griffin's motions in limine, the Circuit Court forbade St. Paul from telling the jury about the Maryland insurance proceeds. **Ab 3-4; Add 80.** At the end of Griffin's case and again at the end of St. Paul's case, both parties moved the Court to rule for them, as a matter of law, under the valued policy statute. Without giving any reasons for its rulings, the Circuit Court denied all those motions. **Ab 18-19, 25-26.** After deliberating less than an hour, the jury returned the \$1.2 million verdict sought by Griffin. **Ab 30, 33.** St. Paul's post-trial motions failed to convince the Circuit Court that it had erred in applying the valued policy statute to this builder's risk policy. **Add 90-93, 114.** St. Paul's timely appeal followed. **Add 115.**

VII.

ARGUMENT

A. A Summary Of St. Paul's Argument

As this Court's *de novo* review will reveal, saying "valued policy statute" cannot turn an open builder's risk policy into a valued policy. In Re Adoption of Martindale, 327 Ark. 685, 688-89, 940 S.W.2d 491 (1997)(standard of review). Through a creative but confused reading of Arkansas's valued policy law, Griffin Construction seeks to recover five times the amount of the partial loss it suffered when the Josiah Foster building burned. Griffin had just begun renovating that structure when the fire occurred. Misapplying the statute, the Circuit Court gave the contractor that windfall. The Judgment below, however, cannot withstand scrutiny.

Griffin hangs its claim on:

A.C.A. § 23-88-101 Valued Policy Law.

(a) A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand and against the company taking the risk, for the full amount stated in the policy, or the full amount upon which the company charges, collects, or receives a premium.

(b) However, the provisions of this section shall not apply to personal property.

The value policy statute controls cases where the insured and the insurer: (1) fix a specific amount of coverage on existing improvements to land, (2) fix a premium that does not change, and (3) then face a total loss by fire of the property insured. This Court has faithfully applied the statute in the many factual variations on those general

principles. *E.g.*, Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz, 72 Ark. 365, 80 S.W. 576 (1904); Farmers' Home Mut. Fire Ass'n. v. McAlister, 171 Ark. 574, 285 S.W. 5 (1926); Tedford v. Security State Fire Ins. Co., 224 Ark. 1047, 278 S.W.2d 89 (1955); Sphere Drake Ins. Co. v. Bank of Wilson, 312 Ark. 540, 851 S.W.2d 430 (1993); *see generally*, Note, "Problems Arising Under Valued Policy Insurance Statutes," 12 Ark. L. Rev. 184 (1958).

This Court, however, has never held or suggested that our valued policy law applies to a builder's risk policy like the one St. Paul issued to Griffin Construction. The statute does not apply. No valued policy exists where the improvements are planned but not completed, where only one of the parties -- the contractor -- has estimated their expected value, where the parties have not fixed the amount of coverage, and where the insurer has estimated the premium pending completion of the construction.

Though it covered the peril of fire, this builder's risk policy was not, in the words of the statute, "[a] fire insurance policy[.]" As St. Paul's underwriter testified, all kinds of insurance cover the peril of fire -- automobile insurance, life insurance, and builder's risk insurance. **Ab 12-14**. But coverage for that peril, does not, in and of itself, create a valued policy. 1 L. R. Russ & T. F. Segalla, Couch on Insurance 3d § 1.5 at p. 1-10 and § 1.37 at p. 1-53 (1997) (comparing open and valued policies and describing fire insurance policies).

No reported decision supports the Circuit Court's erroneous Judgment. Instead, every other state confronting a modern builder's risk policy and a similar valued policy statute has held that the policy is open and the statute does not apply. *E.g.*, American

General Fire & Cas. Co. v. Buford, 716 S.W.2d 86, 89 (Tex. App. 1986, writ ref'd n.r.e.) (construing Tex. Ins. Code Ann. art. 6.13, which provides -- in words identical to Arkansas's statute -- that "[a] fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered a liquidated demand against the company for the full amount of such policy . . .", and holding that the valued policy statute did not apply to a partial loss insured by builder's risk coverage); Jones v. State Farm Fire & Casualty Co., 740 S.W.2d 708, 709-10 (Mo. App. 1987) (construing V.A.M.S. § 379.140, which provides that "in the case of total loss of the property insured, the measure of damage shall be the amount of the [property] was insured . . ." less depreciation, and holding that it did not apply to a partial loss insured by builder's risk coverage).

Arkansas's valued policy law does not control the open builder's risk policy that Griffin Construction bought from St. Paul. The policy was "open" in several ways: the number of projects could vary, and the value of each project varied too. Griffin did not pay a fixed premium. Instead, St. Paul estimated the contractor's premium, and the parties agreed that the premium would not be fixed until the project was completed. The parties did not fix an amount of coverage for projects. Instead, Griffin gave St. Paul an estimate -- nothing more -- of the expected value of the renovations it planned for the Josiah Foster building. That was the project limit. And the parties agreed that St. Paul would provide coverage for the contractor's actual loss, not the project limit:

[T]he amount we'll pay is not the project limit. The amount we'll pay is determined by the actual cost of the labor and materials you've expended, plus your profits, as determined at the time of the loss. So the actual limit of coverage on any date will be a percentage of the estimated value.

Add 24. A close look at the policy and the parties' dealings shows that this builder's risk policy was open, not valued. Therefore, A.C.A. § 23-88-101 does not control this insurance.

The Circuit Court's misapplication of the valued policy law in this case creates several perverse results. First, it frustrates the statute's purposes: this Judgment encourages over insurance by contractors on their projects, compromises insurers' rights to inspect property before fixing the premium, and replaces an agreed value with the contractor's estimated value of what he plans to build. Second, the Judgment misapplies the statute to personal property: the contractor's expectation interest in the materials, labor, and profit from a building project not yet built. That violates the statute's explicit limitation to real property only. Third, the Circuit Court error gives Griffin an unconscionable windfall. This contractor has already been made whole -- several times over -- for what it lost in the fire. Pretending that this open builder's risk policy is a valued policy hands Griffin Construction an unjustified jackpot.

The record leaves no doubt: the Circuit Court erred in failing to enter judgment as a matter of law for St. Paul on this open insurance policy. This Court should correct that error, reject Griffin's confused reading of the valued policy law, and reverse this Judgment.

B. The Valued Policy Law Does Not Control Griffin Construction's Insurance With St. Paul

1. Griffin Did Not Buy A Valued Fire Insurance Policy

Griffin Construction's lawsuit, as finally amended, rests on a novel theory. No reported decision of the Arkansas Supreme Court or Court of Appeals applies our valued policy statute to an insurance policy like St. Paul's. Four other jurisdictions have recently considered similar builder's risk policies in light of similar valued policy statutes. The conclusion is unanimous: modern builder's risk policies are open, not valued; and when a construction project burns before it is completed, a contractor is only entitled to recover what it actually lost in the fire, not the total expected value of the project when completed. White v. New Hampshire Ins. Co., 390 N.W.2d 313 (Minn. App. 1986); American General Fire & Cas. Co. v. Buford, *supra*; Jones v. State Farm Fire & Cas. Co., *supra*; American Family Mut. Ins. Co. v. Doug Rose, Inc., 841 S.W.2d 698 (Mo. App. 1992); Averill v. Preferred Mut. Ins. Co., 441 S.E.2d 632 (S.C. 1994).

This Court should follow those persuasive authorities. There is no "rhyme or reason for [St. Paul] to be liable for the face amount of the policy before . . ." Griffin completed its work at the Josiah Foster building. Jones, 740 S.W.2d at 710.

(a) St. Paul's Open Builder's Risk Policy

Griffin's policy of insurance with St. Paul was open, not valued. A leading commentator explains why. "A valued policy is one in which the measure of the property insured is agreed upon by both parties to the contract, so that in case of a total

loss it is not necessary to prove the actual value. Indeed, it has been stated that it is the uncertainty of the amount which distinguishes an open from a valued policy." 6 J. Appleman, Insurance Law and Practice § 3827 at pp. 245-46 (1972 and 1993 Supp.); *see also*, Buford, 716 S.W.2d at 89-91 (applying this rule, concluding that a builder's risk policy was not a valued policy, and holding that the contractor was only entitled to coverage for his actual loss); 1 L. R. Russ & T. F. Segalla, Couch on Insurance 3d § 1.5 p. 1-10 (1997).

This Court's decisions under our valued policy law show the principled distinction between "open" and "valued" policies in action. Every reported case involves a structure on which the insured and the insurer fixed a specific amount of coverage and thus an agreed value. *E.g.*, E. O. Barnett Bros. v. Western Assur. Co., 143 Ark. 358, 359, 220 S.W. 465 (1920) (fixed coverage for one-story home of \$600.00); Phoenix Assur. Co., Ltd. v. Loetscher, 215 Ark. 23, 24, 219 S.W.2d 629 (1949) (fixed coverage for a commercial garage at \$12,000.00). No fixed amount of coverage, which would in turn establish an agreed value, appears in this case.

St. Paul repeatedly argued the distinction between open and valued policies to the Circuit Court. **Ab 25; Add 57, 75, 85-86, 90-91.** The Court also heard undisputed testimony from St. Paul's underwriter and its adjuster about the difference between these two kinds of policies. **Ab 13-14, 24-25.** The Court below, however, refused to hold that this builder's risk insurance was an open policy to which A.C.A. § 23-88-101 did not apply. **Ab 2-3, 19, 25-26.** There lies the error of law that permeates this record. Construing this statute is the Court's work; it is a matter of law. In Re Adoption of

Martindale, 327 Ark. at 688-89; Rogers v. Tudor Ins. Co., 325 Ark. 226, 232-35, 925

S.W.2d 395 (1996). And as this Court's plenary review will show, Griffin did not buy a valued policy.

- **The Policy's Varying Coverage**

The record proclaims from beginning to end that Griffin Construction's policy was open in every material respect. How much coverage existed for the Josiah Foster project? It varied. The policy undermines any argument that the parties agreed on the value of Griffin's work. Under the "Rules for Loss Adjustment" section, St. Paul's policy explained the floating nature of its coverage.

Limits of Coverage. The most we'll pay for a covered loss is the applicable limit of coverage shown in the Coverage Summary. The project limit and the catastrophe limit are explained below.

The project limit is based on your estimate. We estimate your premium based on what you tell us the full completed value of your project will be. This estimated amount becomes the project limit.

However, the amount we'll pay is not the project limit. The amount we'll pay is determined by the actual cost of the labor and materials you've expended, plus your profits, as determined at the time of the loss. So the actual limit of coverage on any date will be a percentage of the estimated value.

Add 24.

Griffin bought this policy through its agent of almost twenty years, Bill Plegge. The binder Plegge issued to Griffin did not fix a value of the property insured. Under the category of "Limits of Liability or Amount of Insurance," the binder stated:

3,000,000	Project Limit
300,000	Transit Limit
300,000	Temporary Location Limit.

Add 119. Thus, the parties began this relationship with "limits" or ceilings for coverage, not fixed amounts of coverage or agreed values.

St. Paul's policy was open in another way: it covered multiple construction projects, so long as Griffin reported each one to the insurer. **Ab 10-11, 19-20.** The coverage summary gave the location of covered projects as "various." **Add 13.** David Loveless, St. Paul's underwriter for this policy, linked the "various" feature of the policy to the reporting form. When Griffin sent St. Paul the form for the Josiah Foster project on Garrison Street in Fort Smith, the project became covered under the policy. **Ab 14.** This feature saved the contractor time and money; it did not have to buy a new policy for each new project. **Ab 20.** Griffin took advantage of this flexibility, insuring at least three other projects besides the Josiah Foster renovation under this policy. **Ab 10.**

St. Paul's policy was open on the particulars of each project it covered, including the Josiah Foster renovation. Griffin triggered coverage by sending St. Paul a reporting form that listed the "contract price" for this project as "\$1,500,000.00." **Add 118.** That figure was Griffin's estimate of the value of all the renovations once they were completed. As the trial testimony and the terms of this insurance policy make plain, that figure was neither an agreed value nor a fixed amount of coverage. It was an

upper limit of coverage for the Josiah Foster renovations.

Ida Hunter is the comptroller for Griffin Construction. She handled insurance in general, and the St. Paul policy in particular, for the contractor. **Ab 5, 8.** According to Hunter, the \$1.5 million contract figure did not come from a written contract. No such agreement existed between the Griffin Family Trust and the contractor. **Ab 9.** She testified:

I know how the \$1.5 million figure was arrived at: Griffin Construction did an estimate based on materials plus overhead. Sometimes we hit those estimates on the nose, sometimes we don't. Sometimes we go under, and a lot of times we go over. That is the construction industry. Griffin Construction's actual agreement with the Trust was for whatever the project cost plus 10% overhead.

Ab 9.

As St. Paul's policy made clear, the extent of coverage for a particular project was provisional, not fixed. The "Coverage Summary" St. Paul gave to Griffin contained no agreed values. Echoing the binder, it specified "Limits of Coverage." **Add 8.** The policy then explained the coverage Griffin Construction paid for. Under the "Property Covered" section, the policy provided: "We'll cover your financial interest in insured building and installation projects and structures at the location shown in the coverage summary." **Add 19.** The policy did not say it covered Griffin's *expected* financial interest in its building projects. As Ms. Hunter testified, Griffin bought this "policy to cover the improvements[,]" and the building was not improved until the work was actually done. **Ab 8.**

Instead, Griffin and St. Paul agreed that the amount of coverage depended on the extent of the work completed on the date of a loss. "[T]he amount [St. Paul will] pay is not the project limit. The amount we'll pay is determined by the actual cost of the labor and materials [Griffin Construction has] expended, plus your profits, as determined at the time of the loss. So the actual limit of coverage on any date will be a percentage of the estimated value." **Add 24.** There is nothing novel in that understanding. It fits with the nature of a construction project: its value changes every day because the materials expended and the labor costs incurred change every day.

As Ken Custer, St. Paul's adjuster on this loss, explained, "St. Paul did not have a specified value[]" for which it insured on the Josiah Foster renovation work. "St. Paul can't have specific values on a policy like this because it changes every day. As the contractor is working it changes continually as the labor charges go into the amount the contractor has for the building." **Ab 23.** Richard Griffin, the president of Griffin Construction, concurred. According to the contractor, every day the value of his company's labor, material, and other expenses relating to the project changed. **Ab 7.**

- **Griffin's Original Claim**

Griffin Construction's original claim to St. Paul after the fire exemplifies the open nature of this coverage. Griffin submitted invoices and documentation for \$268,602.21 of items. **Ab 22.** St. Paul paid for every item submitted except \$61,793.77 for the custom elevator and staircase (the parties' disagreement over which started this case). **Ab 22-23; Add 2, 77-79.** St. Paul paid for Griffin's:

labor costs
scaffolding
ear plugs
a telephone
porta-light hookups
oil
light stands
ice

fuel for generators
propane
gasoline for vehicles
architects' fees
city and state fees
engineering fees
expendable tools
building materials

Ab 9-10, 22-23. As Ken Custer, St. Paul's adjuster put it, "[i]f Griffin gave us an invoice for a box of nails, we paid for it." **Ab 23.**

Pursuant to the policy, and the handshake agreement between the Griffin Family Trust and Griffin Construction, St. Paul then calculated and paid the profit Griffin Construction lost on the destroyed part of the project: St. Paul paid the contractor 10% overhead on all the materials used and expenses incurred. **Ab 23.** In sum, St. Paul paid Griffin Construction \$286,573.67 for all these things pursuant to this open policy. **Ab 22-23.**

Not one of the items for which St. Paul paid Griffin was valued in this policy. Listing them shows why: as everyone agreed, on a construction project the value of materials, expenses, labor, and overhead expended by a contractor changes every day. **Ab 7, 23.** Their value cannot be fixed in advance, hence this creature called an open builder's risk policy.

- **Guidance From Other Jurisdictions**

The cases from other jurisdictions reject Griffin's novel theory based on this understanding of construction projects and builder's risk policies. In Buford, for

example, the policy recited only "an estimated completion cost[]" for the project. No specific amount of coverage was agreed upon. The Texas Court of Appeals therefore rejected a contractor's effort -- like Griffin's effort in this case -- to recover more than it actually lost in the fire by standing on a valued policy statute almost identical to ours. Buford, 716 S.W.2d at 89-91, 93 (considering Tex. Ins. Code Ann. art. 6.13 and a builder's risk endorsement, holding that the policy was not valued, and remanding for a determination of the value of the improvements actually destroyed); *see also*, White, 390 N.W.2d at 315-16 (rejecting contractor's attempt to recover the estimated value of the completed project under M.S.A. § 65A.08, Minnesota's valued policy law, when the project was destroyed before completion where the policy limit was "provisional" and the policy limited coverage to the "actual value" of the loss).

This record contains a valued insurance policy, a policy that fixes a specific amount of coverage and thus an agreed value. But it is not St. Paul's policy; it is Griffin Construction's policy with the Maryland Companies. **Ab 1; Add 96-111.** Griffin Construction and that insurer agreed to value the Josiah Foster building itself at \$500,000.00. **Ab 2.** That insurer inspected the old structure and fixed coverage at the actual value and replacement cost of the building for a total loss by fire. **Add 105-11.** And the Maryland Companies paid Griffin Construction's claim for \$500,000.00 (plus \$5,000.00 for debris removal) when the building burned. **Add 94-95.** Fixed coverage = a valued policy.

* * *

Just like the policies in Buford and White, and unlike the Maryland policy, St. Paul's policy contained no agreed value that fixed a certain amount of coverage for Griffin Construction's interest in the renovations. An agreed value fixing the specific amount of coverage is the essential condition for a valued policy. Because that condition was absent from St. Paul's policy, and indeed is directly contrary to the nature of this coverage, Griffin did not buy a valued policy from St. Paul.

(b) Griffin's Estimated Premium

The kind of premium Griffin Construction paid for this policy confirms that it was open, not valued. Griffin paid an estimated premium, not a fixed premium. That undisputed fact makes this case different from any prior decision of this Court under our valued policy law. And that fact, along with the estimated value of the project and the terms of this policy, entitles St. Paul to a judgment as a matter of law.

- **The Policy Terms**

The record speaks with one voice about Griffin's estimated premium. Consider the documents first. In the section entitled "Your Premium," St. Paul's policy explained how Griffin paid for this floating builder's risk coverage:

You agree to tell us, at the starting date of this agreement, what you know to be the full estimated value of the project so that we can estimate your premium. We estimate your premium because the final completed value of a project may differ from the original estimate of the project costs.

When coverage under this agreement ends, we'll figure the premium we've actually earned based on the length of time this agreement was in effect and the actual completed value of the project. If this final premium is more than you've paid, you'll owe us the difference. If it's less, we'll return the difference.

Add 25. There you have it: the parties agreed, in unambiguous terms, that Griffin Construction's premium was but an estimate.

Every other part of the policy that mentioned the premium confirmed that it was not fixed. **Add 7** (the "Introduction" stated that the premium for one year is \$4,000.00, then referred the contractor to the "Premiums" section to see how the final premium was calculated); **Add 7, 10** (the "General Rules" provision stated that Griffin Construction's "actual premium" would be figured at the end of the policy); **Add 8** (the "Coverage Summary" showed an "Estimated Premium" of \$4,000.00 and a minimum premium of \$1,500.00); **Add 27** (the premium endorsement stated that the initial premium was just a deposit). The binder, with which the parties began this coverage, likewise does not fix a premium. **Add 119-20.** All these writings make plain that Griffin's premium was estimated and would not be fixed until coverage ended.

- **The Testimony**

The testimony tracked the documents. The parties stipulated that Griffin Construction had paid all the premiums due at the time of the fire. **Ab 8** (trial stipulation announced by the Court); **Add 42** (agreed facts). What, however, was the nature of the premium that Griffin paid? It was only an estimate, drawn from Griffin's \$4,000 premium deposit. **Add 25.** That was confirmed by Ida Hunter, **Ab 10**, and

Richard Griffin. **Ab 6.** Griffin's estimated premium "did not buy Griffin up to \$1.5 million in coverage." **Ab 11.**

St. Paul's witnesses explained the undisputed nature of the premium. David Loveless, the underwriter, testified that "Griffin Construction paid an estimated premium. It is not an actual premium. It is estimated because there is no guarantee at the beginning of the project that, when everything is said and done, the project will end up at the value recorded." **Ab 15.** As Ms. Hunter had acknowledged, the contractor's estimates of the value of a project often miss the mark. **Ab 9.** This policy, Loveless continued, allowed for "the adjustment of premiums." **Ab 16.** The final premium goes up or down depending upon what actually happened on the project. Loveless gave an example from personal experience: when a contractor lost part of a job building a Wal-Mart, St. Paul "went back to the inception [date of the policy] and returned their premium." **Ab 17.**

Not only was Griffin's premium estimated, it was estimated at a reduced rate. Loveless told the Circuit Court why: "St. Paul divides the rate it charges for builder's risk coverage in half. We do that because at the beginning of the builder's risk, the contractor will have nothing but a vacant lot. There will be no risk whatsoever. At the end of the project, you will have a finished project or a finished building. It would be unfair to charge the contractor the rate we would charge on a completed building from the beginning because it isn't there . . . So we anticipate charging a rate at the mid-point or average of the construction job . . . That is our way of balancing out the exposure." **Ab 14-15.** Griffin's longtime insurance agent, Bill Plegge, confirmed that

"[t]he premium on a builder's risk policy is weighted. It is different from an automobile policy or fire policy or package policy." **Ab 20.**

The estimated premium paid by Griffin Construction dooms its claim under the valued policy law. In every case decided under that statute this Court has confronted a fixed premium. *E.g.*, E. O. Barnett Bros., 143 Ark. at 359, 361 (premium fixed at \$15.00 for \$600.00 of fire coverage for three years on a house); Tedford, 224 Ark. at 1047 (premium fixed at \$71.50 for the first year and \$55.77 for the next four years for \$4,500.00 of fire insurance coverage on a house and barn). Not here.

- **Guidance From Other Jurisdictions**

The cases on point from other jurisdictions make the effect of Griffin's estimated premium plain. In general, builder's risk coverage contemplates an estimated and reduced premium. That signifies the openness of this kind of coverage. *E.g.*, Buford, 716 S.W.2d at 91-92 (describing the reduced premium required under Texas law for builder's risk). In Jones, as in this case, "[t]he premium paid for the policy was a reduced premium wherein the rate was based on the average amount of liability during the period of construction." Jones, 740 S.W.2d at 709. In light of the premium, "[t]here is no rhyme or reason for [the insurer] to be liable for the face amount of the policy before the building was completed." Jones, 740 S.W.2d at 710.

A handful of old cases dealing with a total loss by fire during a construction project also support reversal. Loetscher, 215 Ark. 23, 219 S.W.2d 629 (1949); American Cent. Ins. Co. v. Antram, 38 So. 626 (Miss. 1905); King v. Phoenix Ins. Co., 92 S.W. 892

(Mo. 1906). Each of these cases involved a valued policy, not a modern open builder's risk policy. In each of these cases, the parties fixed -- rather than estimated -- the premium. And in each of these cases, the parties fixed a specific amount of coverage -- rather than agreeing to floating coverage as work progressed. Loetscher, 215 Ark. at 24; Antram, 38 So. at 626; King, 92 S.W. at 893. Moreover, the Missouri Court of Appeals expressly distinguished King on this basis when it rejected a claim like the one Griffin Construction makes in this case. Jones, 740 S.W.2d at 710-11.

- **Griffin's Maryland Policy**

Consider, again, Griffin Construction's insurance with the Maryland Companies.

Griffin paid a fixed premium for each kind of coverage:

COMMERCIAL PROPERTY COVERAGE PART	\$ 15,820.00
COMMERCIAL GENERAL LIABILITY COVERAGE PART	\$ 17,513.00
COMMERCIAL CRIME COVERAGE PART	\$ 179.00
COMMERCIAL INLAND MARINE COVERAGE PART	\$ 2,705.00
TOTAL	\$ 36,217.00

Add 96. The Maryland Companies reserved the right to "adjust" these premiums, and did so by an endorsement extending coverage, but these premiums were fixed rather than estimated. **Add 96, 98-99.** A fixed premium + a fixed coverage amount = a valued policy.

St. Paul argued repeatedly to the Circuit Court that the estimated and reduced premium paid by Griffin Construction showed that it did not have a valued policy. **Ab 19, 25; Add 90.** The Circuit Court refused to see the reason in St. Paul's position. **Ab 19, 26.** The Judgment awarding Griffin five times more coverage than it paid for was the

bad result of that error.

* * *

This was not a valued fire insurance policy. It was an open builder's risk policy. Common sense, the lack of a fixed amount of coverage, the estimated premium, the clear terms of this policy, and the recent cases from other states on this identical issue, all light this Court's way to the correct decision: our valued policy statute does not apply to the open insurance Griffin Construction bought from St. Paul.

2. Applying The Valued Policy Statute To Open Builder's Risk Policies Will Defeat The Statute's Purposes

The purposes of the valued policy statute do not apply to the bargain between Griffin Construction and St. Paul. As the cases teach, the statute has four goals:

- avoiding the uncertainty of establishing value after a fire;
- guarding against over insurance;
- protecting the insurer's right to inspect the property before fixing the premium; and
- protecting the parties' valuation set before the loss.

McAlister, 171 Ark. at 575; Tedford, 224 Ark. at 1049-51; Bank of Wilson, 312 Ark. at 542-43. The Judgment achieves none of those purposes. Moreover, applying the valued policy statute to Griffin's open builder's risk policy frustrates the statute's goals.

"Statutes of this sort are passed for the purpose of avoiding the uncertainty of determining the value after the fire." Tedford, 224 Ark. at 1049. There are no

uncertainties in this case. There will almost never be any uncertainties about value in any case involving a builder's risk policy such as this one. When a fire happens in the middle of a project, contractors like Griffin will have at hand a complete record of their work and materials expended. The timing of the event makes this contemporaneous record a near certainty.

In this case, for example, Griffin Construction documented its actual loss easily. It had records of everything it put into the project from earplugs to ice to labor to overhead. Those records formed the basis for the contractor's original claim to St. Paul. And they formed the basis of St. Paul's \$286,573.67 payment to Griffin Construction.

Ab 9-10, 22-23.

Griffin and St. Paul disagreed about whether the \$61,793.77 custom elevator and staircase should be considered part of that loss, and that dispute started this suit. **Ab 1-2.** But Griffin knew to the penny what it lost. The facts of this case make the point: there is no work for the valued policy statute to do in disputes over builder's risk policies.

"The manifest policy of the statute is to guard against over-insurance of the property." Tedford, 224 Ark. at 1049. Letting this Judgment stand, however, promotes over insurance. Contractors like Griffin -- who are in sole control of the estimated costs of their projects -- can inflate those estimates easily. Insurance companies like St. Paul might be inclined to accept such over-valuations, and then accept higher premiums to cover the unforeseen risks made real by this case.

This Judgment sends two clear messages. To contractors, the word is, "Inflate your project estimates, and buy as much insurance as you can to increase the chances of a windfall after a fire." To insurance companies, the word is: "Accept over-valuations and inflated premiums on builder's risk policies to cover the windfalls to contractors when a partially completed project burns up." Neither message keeps faith with the statute. This Judgment promotes over-insurance, rather than preventing it.

For policies covered by the valued policy law, "[t]he agents of the company have the opportunity to inspect the property fully before taking the insurance and fixing the amount of the premium." Tedford, 224 Ark. at 1049. No. Not in this case, and not ever in a builder's risk situation. There was nothing for St. Paul or its agent to inspect. **Ab 15, 21.** Griffin Construction's "property" was not the building. The Josiah Foster building belonged to another entity, the Griffin Family Trust. **Ab 5.** The contractor's "property" was the renovation project. It was all the materials, the elevator, the staircase, and the potential profit from the related labor.

St. Paul had no opportunity to inspect Griffin Construction's property before it issued this policy. **Ab 15, 21.** Compare, e.g., E. O. Barnett Bros., 143 Ark. at 361 ("[T]he agent soliciting the application for the policy stated that she had inspected the property; that the building was complete; and that she had charged the regular rate . . ."). The testimony at trial showed St. Paul's complete reliance on Griffin Construction: the total expected value of the project when done was an estimate made by Griffin alone. **Ab 6, 9, 15-16.**

Where the insured property does not yet exist, an insurance company such as St. Paul is at the insured's mercy in determining value. St. Paul never had the inspection opportunity on which the valued policy statute is premised. No company will on an open builder's risk policy; that is the nature of this insurance: it covers contractors' growing financial interest in a project during their work building that project. As St. Paul's underwriter testified, a project must be at least 70% complete before it can be valued accurately. **Ab 15.** This Judgment, therefore, does not serve the third purpose of the valued policy statute -- promoting inspections before the insurance begins.

The valued policy statute's fourth and last purpose is to protect "the valuation fixed in advance by the parties by way of liquidated damages . . . [incurred] without fault of the insured." Tedford, 224 Ark. at 1049. No such purpose appears in this case.

This was an "Open Builder's Risk" policy. **Add 8.** Valuation was not closed or settled. The parties fixed no valuation in advance. Griffin Construction estimated the total value of its planned renovation of the Josiah Foster building. But the policy provided, and all the parties knew, that the project's final value would vary. In builder's risk policy cases -- where an actual, agreed value of the insured interest is missing -- the statutory purpose of fixing a valuation before a loss cannot be served.

* * *

This Court is "duty bound to reject any interpretation of a statute that results in absurdity or injustice, leads to contradiction, or defeats the plain purpose of the law." Weiss v. Central Flying Serv., Inc., 326 Ark. 685, 690, 934 S.W.2d 211 (1996). The open

builder's risk policy St. Paul issued to Griffin Construction is not a valued policy covered by the statute. No other conclusion achieves the purposes of Arkansas law. This Court should reverse the judgment to reflect that legal truth.

**3. The Uncompleted Part Of The Renovation Project
Was Not Real Property Covered By The Statute**

The valued policy law "shall not apply to personal property." A.C.A. § 23-88-101(b). Those are the plain, unambiguous words of the statute. The cases so hold. *E.g.*, Farmers Union Mut. Ins. Co. v. Denniston, 237 Ark. 768, 776-77, 376 S.W.2d 252 (1964); Farm Bureau Mut. Ins. Co. v. Barnes, 228 Ark. 68, 69-70, 305 S.W.2d 673 (1957). The Circuit Court's rulings and the Judgment, however, offend that settled rule. Because Griffin Construction seeks coverage for what is, at best, personal property, the valued policy law does not apply.

Griffin Construction did not lose \$1,500,000.00 of real property. St. Paul made Griffin whole for the fixtures -- the actual improvements the contractor made in the building -- lost in the fire. Third Amended Complaint § III. Add 78. St. Paul also paid the contractor for non-fixtures -- for example, profit, labor, ice, and gasoline -- covered by the policy. But the contractor wants more. Griffin wants \$1,213,426.33 more from St. Paul. That figure represents the balance of contractor's estimate of the total value of the completed project, less what St. Paul paid for the completed improvements. It is an estimate of the total materials and labor the contractor would have used, and the total profit it would have made, on the finished job. The statutory difficulty for Griffin is

this: the "more" it wants is personal property not covered by the valued policy statute.

"The legislature undoubtedly had a reason for excluding personal property from the operation of the valued policy law. Why was that distinction made?" Barnes, 228 Ark. at 70. Speaking for a unanimous Court, Justice George Rose Smith answered that question later in the Barnes decision: the legislature excluded personal property to promote pre-loss inspections and pre-loss agreements on the value of the property insured. "The valued policy law was limited to real property because that type of property is of a permanent nature, is readily open to inspection, and is susceptible of a reasonably accurate valuation by the insurer." Barnes, 228 Ark. at 70.

Personal property is different. "[P]ersonal property, such as a stock of merchandise, often varies in quantity and in value and may be so scattered and so packaged that the prospective insurer cannot determine its worth by inspection." Barnes, 228 Ark. at 70. The "real character" of the property insured therefore controls whether it is covered by the valued policy law. Denniston, 237 Ark. at 776-77.

What was the real character of Griffin Construction's interest in the unfinished part of the renovation project? That interest was not something permanent. The final value of the improvements, Griffin has always acknowledged, was an estimate about something that did not exist. **Ab 9**. The contractor's "property" was not readily open to inspection. **Ab 21**. And that "property" was not susceptible to a reasonably accurate valuation. **Ab 15**. Instead, like the stock of merchandise described by the Barnes Court, a contractor's interest in an uncompleted building project is elusive. Its value changes daily. **Ab 14-16**. The materials to be used will be scattered and packaged so that the

insuror cannot determine value by inspection. 228 Ark. at 70. In one sense a building project is even more elusive than merchandise: when coverage begins, there is often nothing there to inspect. That was true here.

Griffin Construction's interest in the uncompleted construction project was personal, not real, property. That is its "real character . . ." Barnes, 228 Ark. at 70. Our valued policy statute, therefore, does not apply to it. A.C.A. § 23-88-101(b); Denniston, 237 Ark. at 776-77.

VIII.

CONCLUSION

Griffin Construction's theory of recovery is creative, but it is not the law in Arkansas. Our valued policy law does not embrace open builder's risk insurance policies. No precedent from Arkansas supports the contractor's claim to recover what it did not lose. The law of other states offers persuasive authority in support of St. Paul. Our statute cannot apply here without undermining the purposes for which it stands. It cannot apply, moreover, unless a contractor's expectation interest in completing a project is real property.

Griffin has already received what it deserved from St. Paul: the value of everything the contractor lost in the fire, including its expected profit. Griffin has also recovered the value of the Josiah Foster building itself, a building the contractor did not even own, from another insurance policy. Griffin Construction is not entitled to any

more. And the contractor is certainly not entitled to twist our valued policy statute to get a windfall from this fire.

Respectfully submitted,

Curtis L. Nebben (80106)
BASSETT LAW FIRM
P. O. Box 3618
Fayetteville, AR 72702-3618
(501) 521-9996
cnebben@mc2k.com

D. P. Marshall Jr. (90087)
BARRETT & DEACON
P. O. Box 1700
Jonesboro, AR 72403-1700
(870) 931-1700
pmarshall@barrettdeacon.com

Attorneys for Appellant St. Paul

IX.

CERTIFICATE OF SERVICE

I hereby certify that I served St. Paul Fire & Marine Insurance Company's Abstract, Appellant's Brief, and Addendum by mailing a copy of it to R. Gunner DeLay, RUSH, RUSH & COOK, 1713 South D Street, Fort Smith, Arkansas 72901, and Hon. John G. Holland, Sebastian County Courthouse, 35 S. 6th Street, Fort Smith, Arkansas 72901, on this ____ day of November ____.

D. P. Marshall Jr. (90087)

X.

ADDENDUM

A. Pleadings

1. Griffin's First Amended Complaint, **Record ("R") 5** Add 1
 - Exhibit - St. Paul's Builder's Risk Policy, **R 9** Add 4
2. St. Paul's Answer To First Amended Complaint, **R 37** Add 28
3. St. Paul's Responses To Griffin's Requests For Admission, **R 51** Add 31
4. St. Paul's Responses To Griffin's Interrogatories And Requests For Production (Excerpt), **R 55** Add 35
5. St. Paul's Motion For Summary Judgment, **R 91** Add 38
 - Exhibit B - Statement Of Agreed Facts, **R 118** Add 42
6. Griffin's Counter-Motion For Summary Judgment And Response To St. Paul's Motion For Summary Judgment, **R 129** Add 44
 - Exhibit - Affidavit Of Ida C. Hunter, **R 132** Add 47
7. Griffin's Second Amended Complaint, **R 144** Add 49
8. St. Paul's Motion To Strike Second Amended Complaint Or For A Continuance, **R 155** Add 52
9. Trial Setting, **R 163** Add 54
10. St. Paul's Answer To Second Amended Complaint, **R 173** Add 55

11.	St. Paul's Response To Griffin's Counter-Motion For Summary Judgment, R 182	Add 59
	• Exhibit "B" - Hunter Memorandum, Check Stubs, And Deed, R 206	Add 62
12.	St. Paul's Amended Responses To Requests For Admission, R 219	Add 69
13.	St. Paul's Amended Responses To Interrogatories And Requests For Production Of Documents, R 222	Add 72
14.	Griffin's Third Amended Complaint, R 231	Add 77
15.	Griffin's Motions In Limine, R 234	Add 80
16.	St. Paul's Motion to Amend Responses To Requests For Admission, R 242	Add 82
17.	St. Paul's Answer To Third Amended Complaint, R 254	Add 84
18.	Verdict Form, R 257	Add 87
19.	Judgment, R 280	Add 88
20.	St. Paul's Post-Trial Motions, R 304	Add 90
	• Exhibit A - Maryland Co. Check Stubs, R 308	Add 94
	• Exhibit B - Maryland Co. Policy (Excerpt), R 310	Add 96
21.	Griffin's Response To Post-Trial Motions And Motion To Strike, R 551	Add 112
22.	Order Denying Post-Trial Motions, R 578	Add 114
23.	St. Paul's Notice Of Appeal, R 579	Add 115
24.	Supersedeas, R 588	Add 117

B. Trial Exhibits

1. Plaintiff's Exhibit No. 1 - Reporting Form, **R 680** Add 118
2. Plaintiff's Exhibit No. 3 - Binder, **R 718** Add 119